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12 UNITED STATES DISTRICT COURT  
13 SOUTHERN DISTRICT OF CALIFORNIA  
14

15 DENISE KELLER, an individual, on behalf of  
16 herself and all others similarly situated,

17 Plaintiff,

18 v.

19 CEC ENTERTAINMENT, INC., a Kansas  
20 corporation, and DOES 1-10,

21 Defendants.

Case No. 11-cv-00629 WQH-POR

*The Hon. William Q. Hayes*

**CEC ENTERTAINMENT, INC.’S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF CEC  
ENTERTAINMENT, INC.’S MOTION TO  
DISMISS COMPLAINT**

CLASS ACTION

JURY TRIAL DEMANDED

Hearing Date: June 13, 2011, 11:00 a.m.,  
Courtroom 4

**NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT**

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1 Third, Plaintiff's claim for a declaration that the games identified in the  
 2 Complaint are illegal is entirely duplicative of Plaintiff's other claims and, therefore, should be  
 3 dismissed.

4 Fourth, because the relief sought in the Complaint is predominantly monetary,  
 5 Plaintiff cannot proceed under Rule 23(b)(2) of the Federal Rules. Plaintiff asserts claims in  
 6 excess of five million dollars. In no event can such a significant sum qualify as ancillary to the  
 7 injunctive relief cited in her Complaint. Thus, her Rule 23(b)(2) class claims should be  
 8 dismissed, or, in the alternative, stricken.

9 Finally, Plaintiff's request for attorneys' fees in connection with her Section  
 10 17200 claim must be denied or, in the alternative, stricken because she is not seeking to validate  
 11 a fundamental constitutional right or statutory policy, as is required for a grant of such relief.  
 12

## 13 II. FACTUAL BACKGROUND<sup>1</sup>

### 14 A. The Parties.

15 Chuck E. Cheese operates family restaurants that feature games, rides, prizes,  
 16 food, and entertainment for children. (Compl. ¶ 1.) Included in a typical Chuck E. Cheese  
 17 restaurant is an "arcade-style game room[]," which "contain[s] a variety of games and rides."  
 18 (Id. ¶ 8.)

19 According to the Complaint, Plaintiff is a mother of two girls, ages three and five.  
 20 (Id. ¶ 3.) She claims to have frequented the Grossmont Center Chuck E Cheese restaurant "on  
 21 numerous occasions" with her children, where "she and her children have paid for tokens" and  
 22 played what she now claims are "illegal games." (Id. ¶ 13.)  
 23

24  
 25 <sup>1</sup> For purposes of this Motion and Rule 12(b)(6), the well-pleaded factual allegations of the  
 26 Complaint must be taken as true. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). Mere  
 27 conclusory assertions, however, are insufficient and need not be credited. Id. Pursuant to Rule  
 28 12(f), the Court should strike any "matter" in the Complaint that is immaterial or impertinent.  
 See FED. R. CIV. P. 12(f) ("[T]he court may order stricken from any pleading any insufficient  
 defense or any redundant, immaterial, impertinent, or scandalous matter.").

1           **B. Plaintiff's Complaint.**

2           Plaintiff describes the games at Chuck E. Cheese restaurants as being operated by  
3 first inserting a token available only for use at Chuck E. Cheese restaurants. (Id. ¶ 8.) Plaintiff  
4 asserts that “[a]t the conclusion of the game, most of the machines dispense a handful of tickets  
5 that can be redeemed for various prizes at a prize center. (Id.) Plaintiff concedes that the prizes  
6 are trivial—such as “a plastic ring or a piece of candy,”(id.) and admits that most of the games at  
7 Chuck E. Cheese restaurants are games based on skill, which she asserts makes them legal. (Id.  
8 ¶ 10.) Plaintiff nonetheless claims that other games available for play at Chuck E. Cheese are  
9 predominantly based upon chance and, as alleged, constitute illegal slot machines. (Id.)

10           Without providing any factual background or support, Plaintiff asserts that she  
11 only “recently realized that some of the games her children were playing involved little or no  
12 skill,” (id. ¶ 13), and now believes certain machines at Chuck E. Cheese that she played are  
13 illegal gambling devices. (Id.) Finally, although she offers no detail regarding the prizes  
14 acquired in return for the games played, Plaintiff asserts that the prizes acquired and the tickets  
15 received were worth “far less than the value of the tokens inserted into the machines.” (Id.)

16           Plaintiff brings four claims for relief:

17           (i) Alleged violations of Section 17200, in which she seeks an “order and/or  
18 judgment from the Court to enjoin Defendant from engaging in practices which constitute unfair  
19 competition” and “which may be necessary” to restore to her (and members of a purported class)  
20 “all monies wrongfully acquired by defendant by means of such practices, plus interest and  
21 attorneys’ fees,” (id. ¶¶ 24-30);

22           (ii) Rescission of an alleged contract between Plaintiff and Chuck E. Cheese, and  
23 “restitution of all sums paid thereon,” (id. ¶¶ 31-34);

24           (iii) Breach of an implied contract, in which Plaintiff alleges that Chuck E.  
25 Cheese “charged and unjustifiably retained excessive sums of money from Plaintiff through  
26 wrongfully charging Plaintiff for the opportunity to play gambling devices and by promoting  
27 gambling to children in order to earn a profit,” and further claims that Chuck E. Cheese was  
28



1 “unjustly enriched at Plaintiff’s expense” and at the expense of the purported class, (id. ¶¶ 35-  
2 38); and

3 (iv) Declaratory judgment, in which Plaintiff claims that the games identified in  
4 the Complaint are “slot machines and illegal,” (id. ¶¶ 39-41).

5 On behalf of herself and a purported class, Plaintiff claims entitlement to  
6 damages, restitution, or disgorgement in an amount greater than \$5 million. (Id. ¶ 1.)

7  
8 **C. The Purported Class.**

9 Pursuant to Rules 23(b)(2) and/or (b)(3), Plaintiff seeks to certify the following  
10 class:

11 For the period of March 29, 2007 through the date of the trial, all California  
12 citizens who purchased tokens and played illegal gaming devices at a Chuck E.  
Cheese’s restaurant located in California including, but not limited to:

- 13 a) Thuderation (sic)
- 14 b) Wheel of Fortune
- 15 c) Big Bass Wheel
- 16 d) Slap Happy
- 17 e) Hat Trick
- 18 f) Chuck E.’s Rubble Bubble
- 19 g) Rollin’ on 24’s
- h) Ticket Troopers
- i) Jackpot Extreme
- j) Wonder Wheel
- k) Deal or No Deal

20 (Id. ¶¶ 15-16.)

21 **III. ARGUMENTS AND AUTHORITIES**

22 **A. The Penal Code on Which Plaintiff Bases All of Her Claims Was Not  
23 Intended to Reach the Kiddie Arcade Games At Issue.**

24 The laws prohibiting the ownership of illegal gambling devices and on which  
25 Plaintiff bases her claim that the games are illegal “slot” machines bear harsh criminal penalties,  
26 including jail time. See CAL. PENAL CODE §§ 330a, 330b, & 330.1. Indeed, the statute was  
27 recently amended insofar as “slot machines” are concerned to impose stiffer criminal penalties.  
28 See Cal. Bill Analysis, Cal. Senate Comm. on Public Safety, A.B. 1753 Sen. (June 22, 2010), a

1 copy of which is attached as Exhibit “A.” The aim of those stiffer penalties and the identity of  
 2 the specific “slot” machines at issue is clear: business owners targeting low-income  
 3 communities through video slot machines camouflaged as “video games.” *Id.* at 1.

4 As pleaded by Plaintiff, Chuck E. Cheese is the model of transparency insofar as  
 5 both its arcade games and its focus on family are concerned. (See Compl. ¶ 4 (stating CEC is “a  
 6 publicly-traded corporation” that “is the owner and operator of 507 Chuck E. Cheese restaurants  
 7 in forty-eight states”).) Plaintiff does not allege that any of the Chuck E. Cheese games are, in  
 8 actuality, video slot machines that are hidden or “camouflaged” from the authorities or that  
 9 Chuck E. Cheese uses its kiddie arcades to target lower income communities with the prospect of  
 10 large monetary payouts upon a successful play. (See generally Compl.) To the contrary,  
 11 Plaintiff alleges that she, along with thousands of other persons, frequented the family-friendly  
 12 restaurant on “numerous” occasions with the prospect of acquiring only trivial prizes of low  
 13 monetary value. (*Id.* ¶ 13.) As such, Plaintiff’s use of the word “slot” as a pejorative description  
 14 of Chuck E. Cheese’s kiddie arcade games does not bring them under the umbrella of a statute  
 15 intended to penalize businesses operating video slot machines camouflaged as video games. See  
 16 Cal. Bill Analysis, Cal. Senate Comm. on Public Safety, A.B. 1753 Sen. (June 22, 2010) (“The  
 17 machines are placed in liquor stores, donut shops, restaurants, video stores, and tobacco shops.  
 18 The video slot machines are generally placed in businesses located in lower income communities  
 19 ... Sometimes, the video slot machines are camouflaged as video arcade games. This allows the  
 20 illegal machine to be placed in public view without being easily detected. *The business owner*  
 21 *can switch the machine from an arcade game to a video slot machine by remote control.*”)  
 22 (emphasis added).) The claims, therefore, should be dismissed as a matter of law.

23  
 24 **B. Plaintiff’s Reading Of California Penal Code Section 330a and 330b Would  
 25 Render The Statute Unconstitutionally Overbroad and Vague.**

26 Alternatively, Plaintiff’s interpretation of the definition of “slot machine” in  
 27 California Penal Code Sections 330a and 330b as applying to the kiddie games played by  
 28 children at Chuck E. Cheese restaurants renders the statute overbroad and unduly vague under  
 the United States and California Constitutions.

1 A statute or regulation is overbroad if “does not aim specifically at evils within  
 2 the allowable area of [governmental] control, but . . . sweeps within its ambit other activities in  
 3 ordinary circumstances that constitute an exercise” of protected expression and conduct, such as  
 4 the right to own and hold property at issue in this case. Gatto v. Cnty. of Sonoma, 98 Cal. App.  
 5 4th 744, 776 (2002) (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)). Further, in order  
 6 for a statute to be overbroad, it must impinge upon some constitutionally protected right. See id.  
 7 Here, the constitutional right that is being impinged is the right—under both the United States  
 8 Constitution and California Constitution—not to be deprived of property without due process of  
 9 the law. U.S. CONST., Amend. V & XIV § 1; CAL. CONST., art. I, §§ 7, 15.

10 Plaintiff cites California Penal Code Sections 330a and 330b for the proposition  
 11 that Chuck E. Cheese has been operating illegal slot machines. (Compl. ¶¶ 10, 28, 33.) The  
 12 relevant portion of Section 330a defines “slot machines” as any machine where “any other thing  
 13 of value, is won or lost, or taken from or obtained from the machine, when the result of action or  
 14 operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard  
 15 or chance.” CAL. PENAL CODE § 330a(a). Similarly, Section 330b defines “slot machines” as

16  
 17 A machine, apparatus, or device that is adapted, *or may readily be*  
 18 *converted*, for use in a way that, as a result of the insertion of any  
 19 piece of money or coin or other object, or by any other means, the  
 20 machine or device is caused to operate or may be operated, and *by*  
 21 *reason of any element of hazard or chance or of other outcome of*  
 22 *operation unpredictable by him or her*, the user may receive or  
 23 become entitled to receive any piece of money, credit, allowance,  
 24 or thing of value, or additional chance or right to use the slot  
 machine or device, or any check, slug, token, or memorandum,  
 whether of value or otherwise, which may be exchanged for any  
 money, credit, allowance, or thing of value, or which may be given  
 in trade, irrespective of whether it may, apart from any element of  
 hazard or chance or unpredictable outcome of operation, also sell,  
 deliver, or present some merchandise, indication of weight,  
 entertainment, or other thing of value.

25 Id. § 330b(d) (emphasis added). The Penal Code permits seizure of such machines. CAL. PENAL  
 26 CODE § 335a (any “machine or other device the possession or control of which is penalized by  
 27 the laws of this State prohibiting lotteries or gambling may be seized by any peace officer”).  
 28

1 Under Plaintiff's expansive interpretation of the California Penal Code's  
2 definition of "slot machine" as applying to any game where *any* element of chance plays a role in  
3 the outcome of the game or that could be converted to an illegal gambling device, certain of  
4 Chuck E. Cheese's property would be subject to seizure, as would similar mechanical devices  
5 that are designed purely for children's amusement—including, by way of example, a personal  
6 computer that could be operated as a gambling device by accessing Internet gambling sites or a  
7 gumball machine that randomly dispenses capsules containing assorted prizes like toys and rings,  
8 the result of which not being within the child's control and thus subject to hazard or chance. See  
9 Dissmeyer v. State, 249 P.3d 444 (Kan. 2011) (invalidating as unconstitutionally overbroad a  
10 similar gaming statute because, under the statute, even "Chutes and Ladders and Twister  
11 children's games use spinners, which are mechanical devices," could be used for gambling). As  
12 in Dissmeyer, the Penal Code section at issue, as applied through Plaintiff's strained  
13 interpretation, would subject Chuck E. Cheese to a denial of its right to own property without  
14 due process of law, which right is protected by both the United States and California  
15 Constitutions. See Dissmeyer, 249 P.3d at \*5-6; see also U.S. CONST., Amend. V & XIV § 1;  
16 CAL. CONST., art. I, §§ 7, 15. Accordingly, it is unconstitutionally overbroad.

17 Similarly, Plaintiff's interpretation of the definition of "slot machine" as applied  
18 to the kiddie games at Chuck E. Cheese renders the statute unconstitutionally vague. The Due  
19 Process clause of the Fifth Amendment, which is made applicable to the states through the  
20 Fourteenth Amendment, prohibits punishment pursuant to a statute so vague that "men of  
21 common intelligence must necessarily guess at its meaning and differ as to its application." U.S.  
22 v. Lanier, 520 U.S. 259, 266 (1997); People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1115  
23 (1997). The central concern in a vagueness analysis is the due process requirement of adequate  
24 notice. Acuna, 14 Cal. 4th 1090 at 1115; see also Lawson v. Kolender, 658 F.2d 1362, 1370 (9th  
25 Cir. 1981), aff'd 461 U.S. 352 (1983). To determine if a person has adequate notice, courts will  
26 look to the context surrounding the law. See, e.g., Acuna, 14 Cal. 4th at 1115.

1 Here, because Chuck E. Cheese would have to speculate as to the application of  
2 the law to its games of amusement, and, indeed, would have no reason to assume that its kiddie  
3 arcade games would constitute illegal gambling. Plaintiff's interpretation of the definition of  
4 "slot machine," if applied, would render the statute unconstitutionally vague under both the  
5 United States and California Constitutions. See Acuna, 14 Cal. 4th at 1115 ("No one may be  
6 required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All  
7 are entitled to be informed as to what the State commands or forbids."); see also Lanier, 520 U.S.  
8 at 266; Lawson 658 F.2d at 1370.

9 **C. Plaintiff Is Barred From Pursuing All Of Her Claims for Relief.**

10 The games identified by Plaintiff in the Complaint are *not* illegal. But even if  
11 they were, Plaintiff's own allegations doom her claims under California law due to her lack of  
12 standing and because of the doctrine of *in pari delicto*.

13 This Court has recognized that "California has a strong, broad, and long-standing  
14 public policy against judicial resolution of civil disputes arising out of gambling contracts or  
15 transactions." Alves v. Players Edge, Inc., No. 05-CV-1654, 2007 WL 6004919, at \*14 (S.D.  
16 Cal. Aug. 8, 2007) (Hayes, J.) (quoting Kelly v. First Astri Corp., 72 Cal. App. 4th 462, 477  
17 (1999)); see also Jamgotchian v. Scientific Games Corp., 371 F. App'x 812, 812-13 (9th Cir.  
18 2010) (upholding dismissal of case on grounds of longstanding public policy against judicial  
19 resolution of gambling disputes); accord Asher v. Johnson, 79 P.2d 457, 460 (Cal. Ct. App.  
20 1938) ("*No principle of law is better settled* than that a party to an illegal contract cannot come  
21 into a court of law and set up a case in which he must necessarily disclose an illegal contract as  
22 the groundwork of his claim.") (emphasis added and quotation omitted). In that regard and as  
23 pronounced in Asher, California courts refuse to render aid to a plaintiff, such as Plaintiff, who is  
24 a participant in an allegedly illegal act:

25 The rule is well established without conflict of authorities that  
26 when a plaintiff, who is the culpable party, is compelled to disclose  
27 the fact that the transaction upon which he relies for recovery is an  
28 illegal violation of criminal law, *the courts will invariably refuse to  
determine the controversy*, and will leave the offender against the  
law exactly where he finds himself at the outset of the litigation.

1 Asher, 79 P.2d at 463 (emphasis added).

2 Consistent with this rule, unless Plaintiff can establish liability against Chuck E.  
3 Cheese *without* relying on her claimed illegal gambling transaction, she has no standing to sue  
4 and the Court should refuse to hear the matter. Cf. id. (“Therefore, the test is declared to be  
5 whether the contract sought to be enforced can be separated from the illegal acts or contracts  
6 relied upon as avoiding it, and whether the plaintiff requires any aid from, *or must in any way*  
7 *rely upon the illegal transaction in order to establish his case.*”) (emphasis added); accord  
8 Wallace v. Opinham, 73 Cal. App. 2d 25, 28-29 (1946) (“The California cases are uniform in  
9 holding that where money or property is lost in a transaction between the parties which is  
10 prohibited by law, neither of the parties has standing in a court of law or equity to recover his  
11 losses.”); see also People v. Rosen, 78 P.2d 727, 728 (Cal. 1938) (holding that participants in  
12 illegal games of chance “have no standing in a court of law or equity”). This she cannot do.

13 According to the allegations in the Complaint, there can be no doubt that:

14 (i) Plaintiff participated in the alleged illegal transaction, and (ii) she must rely on her  
15 participation in order to recover from this Court. Plaintiff admits in her Complaint that she and  
16 her children played the arcade games at Chuck E. Cheese “for an opportunity to win tickets in  
17 order to redeem the tickets for prizes,” and that she and her children did, in fact, receive prizes  
18 for and the benefits of playing the games. (See Compl. ¶ 13.) She does not claim that Chuck E.  
19 Cheese made her participate in arcade games; that she played the games under protest; or that she  
20 was otherwise coerced to play the games. (See generally Compl.) Rather, she concedes  
21 frequenting Chuck E. Cheese to play the games “on numerous occasions,” (Compl. ¶ 13.), and is  
22 thus, in essence, admitting that she should be subject to criminal penalty as a participant in  
23 games claimed to be illegal under California law. Compare CAL. PENAL CODE § 330 (making it a  
24 misdemeanor to “play ... any game of ...*roulette* ... or any banking or percentage game played  
25 with ... any device for money, checks, credit, or other representative of value”) (emphasis  
26 added) with Compl. ¶ 1 (noting that many of the games at Chuck E. Cheese “require little or no  
27 skill and are predominantly games of chance, much like a *roulette* wheel”) (emphasis added).

1 And, under California law and by virtue of her deriving benefits from what she now claims is an  
2 illegal contract, Plaintiff is presumed to have knowledge of its alleged illegality. See Asher, 79  
3 P.2d at 463-64 (“[O]ne who participates in the benefits derived from an illegal contract or  
4 enterprise is deemed to have knowledge thereof.”). Moreover, Plaintiff’s claim for relief to  
5 restore her “lost money and property in the form of money” (Compl. ¶ 30) and for “restitution of  
6 all sums paid” (id.) cannot be proven without resort to evidence of the allegedly illegal games  
7 and the amount of money that she purportedly paid to play them on repeat occasions. The Asher  
8 test is thus satisfied.

9 The Court’s decision in Alves v. Player’s Edge is instructive. 2007 WL 6004919,  
10 at \*14. The Court dismissed the plaintiffs’ Section 17200 claims because the allegations in the  
11 complaint showed that plaintiffs “voluntarily engaged” in a “sports betting program.” Alves,  
12 2007 WL 6004919, at \*14. In so doing, it relied on the California Court of Appeal’s decision in  
13 Kelly v. First Astri Corporation, 72 Cal. App. 4th 462 (1999), in which the plaintiff asserted that  
14 he was injured by playing rigged blackjack games at an Indian casino. Id. at 468. Tracing  
15 California’s public policy against adjudicating civil disputes arising out of gambling transactions  
16 back to the State’s inception, the court in Kelly held that “neither courts of law nor courts of  
17 equity will aid or assist a plaintiff to recover money lost in a gambling game that is prohibited by  
18 law, regardless of where it is played and even if the loss resulted from cheating.” Id. at 477-79;  
19 see also id. at 489 (“California’s public policy against judicial resolution of civil claims arising  
20 out of gambling contracts or transactions absent a statutory right to bring such claims, applies to  
21 all forms of gambling, whether legal or illegal.”). Because the California legislature “has not  
22 enacted a statute permitting the use of the process of the courts in California to resolve the kind  
23 of gambling loss claims asserted in [plaintiff’s] complaint,” public policy barred an action to  
24 recover gambling losses. Id. at 489. The rule applies equally to Plaintiff.

25 Having received benefits from the games and admitted repeat participation in  
26 them, Plaintiff is deemed to have known of their claimed illegality and, having sought restitution  
27 for money allegedly paid to play the games, Plaintiff cannot recover without reliance on the  
28



1 allegedly illegal transaction. See, e.g., Alves, 2007 WL 6004919, at \*14. Plaintiff is thus barred  
 2 from seeking recovery of any money involved in what Plaintiff repeatedly labels “illegal  
 3 gambling,” and the Complaint must therefore be dismissed as a matter of law due to her lack of  
 4 standing and under the doctrine of *in pari delicto*. (See, e.g. Compl. ¶¶ 9, 10, 11, 13, 27.)<sup>2</sup>

5 **D. Plaintiff’s Declaratory Judgment Claim Must Be Dismissed As Duplicative.**

6 Plaintiff seeks a declaration that the kiddie arcade games operated by Chuck E.  
 7 Cheese are illegal slot machines. (See Compl. ¶¶ 39-41, Prayer ¶ E.) The claim should be  
 8 dismissed as duplicative of Plaintiff’s Section 17200 claim in particular.

9 In the Ninth Circuit, declaratory relief “is only appropriate (1) when the judgment  
 10 will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it  
 11 will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to  
 12 the proceeding.” Ricon v. Recontrust Co., No. 09-CV-937, 2009 WL 2407396, at \*6 (S.D. Cal.  
 13 Aug. 4, 2009) (citing Guerra v. Sutton, 783 F.2d 1371, 1376 (9th Cir. 1986)). And federal courts  
 14 in California do not hesitate to dismiss claims for declaratory relief where, as in this case, an  
 15 adequate remedy exists under some other cause of action. See Mangindin v. Washington Mut.  
 16 Bank, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009); see also Ricon, 2009 WL 2407396, at \*6  
 17 (dismissing declaratory judgment claim as “needlessly duplicative”).

18 Here, Plaintiff’s declaratory judgment claim serves no “useful purpose” and is  
 19 “needlessly duplicative.” Ricon, 2009 WL 2407396, at \*6. The question at issue with regard to  
 20 Plaintiff’s declaratory judgment claim—*e.g.*, the alleged illegality of the games referenced in the  
 21 Complaint—overlaps entirely with the question at issue with regard to Plaintiff’s Section 17200  
 22

23 \_\_\_\_\_  
 24 <sup>2</sup> Other courts have refused to hear gambling disputes under the similar doctrine of *in pari*  
 25 *delicto*. See, e.g., Bradley v. Doherty, 30 Cal. App. 3d 991, 995 (1973) (granting demurrer and  
 26 finding that “[t]he general rule is that courts will not recognize such an illegal contract (betting)  
 27 and will not aid the parties thereto, but will leave them where it finds them”) (citations omitted);  
 28 Kelly, 72 Cal. App. 4th at 490-91. Indeed, the doctrine has even been extended to a situation  
 where a plaintiff was allegedly cheated out of a sum of money in the gambling transaction.  
Wallace, 73 Cal. App. 2d at 26-27 (holding that “[p]ublic policy prompts courts to decline to  
 distinguish between degrees of turpitude of parties who engaged in outlawed transaction.”).



1 claim, and the alleged illegality of the games referenced in the Complaint serves as the predicate  
 2 for *all* of Plaintiff’s claims. (See, e.g., Compl. ¶ 28 (“Defendant has engaged in ‘unlawful’  
 3 business practices by violating California Penal Code §§ 330a and 330b”), ¶ 33 (“The contracts  
 4 were illegal and unenforceable in that they violate California Penal Code §§ 330a and 330b”),  
 5 ¶ 37 (“opportunity to play gambling devices”).)

6 Moreover, any determination of the declaratory judgment claim will *not* terminate  
 7 the controversy between Plaintiff and Chuck E. Cheese. Id. Rather, even if Plaintiff succeeds on  
 8 her declaratory judgment claim, the Court will still have before it Plaintiff’s claim for relief  
 9 against Chuck E. Cheese for alleged violations of Section 17200, for breach of implied contract,  
 10 and for rescission—pursuant to which Plaintiff seeks millions of dollars on behalf of a purported  
 11 class. See Ricon, 2009 WL 2407396, at \*6 (dismissing declaratory judgment claim because it  
 12 would not resolve any issue not already addressed by the substantive Section 17200 claim); see  
 13 also Concorde Equity II, LLC v. Miller, 732 F. Supp. 2d 990, 1002-03 (N. D. Cal. 2010)  
 14 (dismissing declaratory judgment where relief sought was redundant and duplicative, and  
 15 resolution of other causes of action would afford plaintiff same relief).

16 For these reasons, the Court should dismiss Plaintiff’s declaratory judgment  
 17 claim.

18 **E. Plaintiff Cannot Maintain a Class Action Under Rule 23(b)(2) and the Relief**  
 19 **Requested Should Be Stricken.**

20 Unlike Rule 23(b)(2), Rule 23(b)(3) of the Federal Rules was designed for use in  
 21 class actions where money damages are sought. Amchem Prods., Inc. v. Windsor, 521 U.S 591,  
 22 614-15 (1997) (“Rule 23(b)(3) added to the complex litigation arsenal class actions for damages  
 23 designed to secure judgments binding all class members save those affirmatively elected to be  
 24 excluded”). The differing treatment stems from the fact that subsection (b)(2) requires the  
 25 injunctive or declaratory relief sought to be in the nature of a uniform “group remedy” that may  
 26 be awarded “without requiring specific or time-consuming inquiry into the varying  
 27 circumstances and merits of each class member’s individual case.” See Allison v. Citgo  
 28 Petroleum Corp., 151 F.3d 402, 414 (5th Cir. 1998). Effectively conceding that she cannot meet

1 the “common issues predominate” requirement in Rule 23(b)(3), Plaintiff vaguely pleads her  
2 causes as class claims pursuant to “23(b)(2) *and/or* 23(b)(3).” (Compl. ¶ 15 (emphasis added).)  
3 Plaintiff, however, inconsistently pleads an entitlement to significant money damages, which  
4 predominates over the injunctive relief she seeks. As such, she cannot proceed under Rule  
5 23(b)(2), and the Rule 23(b)(2) class allegations should be dismissed or, alternatively, stricken in  
6 their entirety.

7           The plain language of Rule 23(b)(2) contains no reference to monetary relief but  
8 refers instead to “final injunctive relief or corresponding declaratory relief.” However, the  
9 Advisory Committee Notes state that Rule 23(b)(2) “does not extend to cases in which the  
10 appropriate final relief relates exclusively or predominantly to money damages.” FED. R. CIV. P.  
11 23(b)(2) advisory committee’s note (1966). Courts, including the Ninth Circuit, have inferred  
12 from this admonition authorization to certify a class under Rule 23(b)(2) in the limited  
13 circumstances where the monetary relief sought by an otherwise appropriate (b)(2) class is *not*  
14 “superior in strength, influence, or authority to the injunctive or corresponding declaratory relief  
15 sought by the plaintiff.” See Butler v. Sterling, Inc., 210 F.3d 371, at \*6 (6th Cir. 2000) (“[A]ll  
16 of the other circuits that have considered the issue have held that certification of a [Rule]  
17 23(b)(2) class turns on whether the injunctive and/or declaratory relief sought . . .  
18 ‘predominate[s]’ relative to any incidental monetary damages requested.”); accord Dukes v.  
19 Wal-Mart Stores, Inc., 603 F.3d 571, 616-17 (9th Cir.), (“Rule 23(b)(2) is not appropriate for all  
20 classes and ‘does not extend to cases in which the appropriate final relief relates exclusively or  
21 predominantly to money damages.’”), cert. granted in part, 131 S. Ct. 795 (2010).

22           Consistent with the foregoing rule, Plaintiff cannot, on the one hand, claim  
23 classwide and uniform relief pursuant to Rule 23(b)(2) and, on the other hand, claim individual  
24 and class damages “in the form of money that was used to purchase Chuck E. Cheese tokens” to  
25 play the arcade games. (Compl. ¶ 29; id. ¶ 34 (seeking “to obtain restitution of all sums paid”);  
26 id. Prayer at D (“Damages, restitution and/or disgorgement in an amount to be determined at trial  
27 but not less than \$5 million.”).) The face of the Complaint makes clear that money damages  
28

1 predominate over the injunctive relief sought by Plaintiff, and she, therefore, should be barred  
2 from proceeding under Rule 23(b)(2). See, e.g., Hovespian v. Apple, Inc., No. 08-5788, 2009  
3 WL 5069144, at \*2, \*6 (N.D. Cal. Dec. 17, 2009) (holding that “Court has authority to strike  
4 class allegations prior to discovery if the complaint demonstrates that a class action cannot be  
5 maintained” and granting Rule 12(f) motion to strike 23(b)(2) class allegations because primary  
6 relief sought was monetary).

7  
8 When faced with a similar fact circumstance where an insured sought to proceed  
9 under Rule 23(b)(2) on his Section 17200 claims for restitution and past injuries, this Court  
10 barred the plaintiff. See *Campion v. Old Republic Home Protection Co., Inc.*, --- F.R.D. ---,  
11 2011 WL 42759, at \*19 (S.D. Cal. Jan. 6, 2011) (“although he [the plaintiff] seeks injunctive and  
12 declaratory relief, the nature of the relief sought is equivalent to a declaration of liability,” and  
13 Plaintiff’s claims are predicated on monetary restitution for putative class members”); accord  
14 *Waters v. Advent Prod. Dev., Inc.*, No. 07-CV-2089, 2011 WL 721661, at \*4 (S.D. Cal. Feb. 22,  
15 2011) (refusing to permit the plaintiff to proceed under Rule 23(b)(2) because “the putative class  
16 will not derive much benefit from an injunction restraining Defendants from violating the  
17 applicable laws . . . . The real benefit to the class members lies in the monetary relief . . .  
18 includ[ing] restitution of the fees paid.”); *Arabian v. Sony Elecs., Inc.*, No. 05-CV-1741, 2007  
19 WL 627977 (S.D. Cal. Feb. 22, 2007) (Hayes, J.) (plaintiffs cannot proceed on their Section  
20 17200 claims under Rule 23(b)(2) where monetary relief was not secondary to the injunctive  
21 relief); cf. *Funliner of Alabama, L.L.C. v. Pickard*, 873 So. 2d 198, 209 (Ala. 2003) (class of  
22 video arcade players claiming restitution of money lost playing video games could not proceed  
23 under analogous Alabama Rule of Civil Procedure 23(b)(2) because money damages necessarily  
24 predominates). The Court should similarly bar Plaintiff in this case.

25 Because it is patently clear from the Complaint that Plaintiff cannot proceed under  
26 Rule 23(b)(2), the Court should dismiss or, alternatively, strike these allegations.  
27  
28

1           **F. Plaintiff’s Claim for Attorneys’ Fees Should Be Dismissed or the Relief**  
2           **Stricken.**

3           Attorneys’ fees are not recoverable under Section 17200, and Plaintiff has not  
4           pleaded an independent right to them under section 1021.5 of the California Code of Civil  
5           Procedure (“Section 1021.5”). See Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.,  
6           20 Cal. 4th 163, 179 (1999) (under Section 17200, “[p]laintiffs may not receive damages, . . . or  
7           attorney’s fees.”); see also Mass. Mut. Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282,  
8           1288 (2002) (“[Section 17200] does not provide for the recovery of damages or attorney’s  
9           fees.”); Am. Online, Inc. v. Superior Court, 90 Cal. App. 4th 1, 11 (2001) (under Section 17200,  
10           “neither actual damages nor attorney fees are recoverable”); Woo v. Home Loan Group, L.P.,  
11           No. 07-CV-0202, 2007 WL 6624925, at \*3 (S.D. Cal. July 27, 2007) (“Prevailing parties under  
12           section 17200 may not receive damages or attorneys’ fees.”). On that basis alone, the relief  
13           requested should be stricken. (See Compl. ¶ 30.)

14           Even if Plaintiff had pled an entitlement to attorneys’ fees under Section 1021.5  
15           (which she has not), such relief is unavailable here. Some courts have permitted the recovery of  
16           (or simply assumed without discussion the availability of) attorneys’ fees pursuant to  
17           Section 1021.5 when a plaintiff brings a Section 17200 claim, but they have done so *only* if  
18           certain public interest standards not relevant in this case are satisfied. See Notrica v. State  
19           Comp. Ins. Fund, 70 Cal. App. 4th 911, 954-55 (1999) (permitting recovery of attorneys’ fees as  
20           a “private attorney general” under Section 1021.5 if injunctive relief confers a significant benefit  
21           on the public); Woodland Hills Residents Ass’n, Inc. v. City Council, 23 Cal. 3d 917, 939 (1979)  
22           (the “significant benefit” required for the recovery of attorneys’ fees under the “private attorney  
23           general” statute is generally the “vindication of a fundamental constitutional right or statutory  
24           policy”); see also Med. Dev. Int’l v. Cal. Dep’t of Corr. & Rehab., No. 10-0443, 2010 WL  
25           2077143, at \*7-8 (N.D. Cal. May 21, 2010) (granting motion to strike allegations under Section  
26           1021.5).

27           Plaintiff seeks purely private relief in the form of money damages, and she does  
28           so while simultaneously admitting that she participated in the transaction that she now claims is

1 illegal. She does not cite to any “fundamental constitutional right” that is being vindicated by  
2 her lawsuit, and, as discussed above, the Penal Code on which her lawsuit is predicated, if  
3 applicable, applies to her as well. Accordingly, she does not (and cannot) seek to vindicate a  
4 fundamental constitutional right or statutory policy.

5 Plaintiff’s request for recovery of attorneys’ fees, therefore, should be dismissed  
6 or, alternatively, stricken from the Complaint.

7 **IV. CONCLUSION AND REQUESTED RELIEF**

8 Based on the foregoing, Chuck E. Cheese respectfully requests that this Court  
9 grant its Motion and dismiss all of Plaintiff’s claims or, alternatively, strike the attorneys’ fees  
10 and Rule 23(b)(2) allegations. Chuck E. Cheese requests all such other relief to which it may be  
11 justly entitled.

12 DATED: May 6, 2011

13  
14 WEIL, GOTSHAL & MANGES, LLP

15 /s/ Christopher J. Cox  
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**TABLE OF EXHIBITS**

<b><u>Exhibit</u></b>	<b><u>Description</u></b>	<b><u>Page(s)</u></b>
A	Cal. Bill Analysis, Cal. Senate Comm. on Public Safety, A.B. 1753 Sen. (June 22, 2010)	1-4